BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LINDA M. RIES	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,022,978
MANPOWER, INC., OF WICHITA	)	
Respondent	)	
AND	)	
	)	
CNA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the November 16, 2006, Award entered by Special Administrative Law Judge E. L. Lee Kinch. The Workers Compensation Board heard oral argument on February 16, 2007, in Wichita, Kansas.

APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for repetitive trauma injuries to claimant's upper extremities. Claimant alleged she developed those repetitive trauma injuries from on or about August 1, 2004, through December 31, 2004. Claimant's last day of working for respondent, however, was January 4, 2005, which Judge Kinch used as the appropriate date of accident for these alleged repetitive trauma injuries.

In the November 16, 2006, Award, Judge Kinch awarded claimant workers compensation benefits for right thumb trigger and de Quervain's in her right thumb and

bilateral carpal tunnel syndrome. The Judge found claimant sustained a 20 percent whole person functional impairment and a 31 percent permanent partial general disability under K.S.A. 44-510e. In addition, Judge Kinch concluded claimant sustained a 24 percent task loss and a 38 percent wage loss.

Respondent and its insurance carrier contend Judge Kinch erred. They admit claimant developed de Quervain's as a result of the work she performed for respondent. But they deny claimant developed carpal tunnel syndrome due to that work. Likewise, they admit respondent had timely notice of the de Quervain's but they deny respondent was given timely notice of the bilateral carpal tunnel syndrome. Consequently, they argue claimant is entitled to receive benefits for only the right thumb injury according to the schedules set forth in K.S.A. 44-510d.

Conversely, claimant contends the Judge erred in determining her post-injury wages and, therefore, the Board should increase her permanent partial general disability.

The issues before the Board on this appeal are:

1. Did claimant's work activities that she performed for respondent cause or contribute to her bilateral carpal tunnel syndrome or did that condition arise from the work she later performed for another employer?

2. Did claimant give respondent timely notice of the hand and wrist problems she experienced from the bilateral carpal tunnel syndrome?

3. What is the nature and extent of claimant's injuries and disability?

4. What preexisting functional impairment, if any, should reduce claimant's award under K.S.A. 44-501(c)?

5. Did the Judge err by permitting respondent and its insurance carrier to modify their stipulation that claimant's accidental injury arose out of and in the course of her employment with respondent and their stipulation that claimant gave respondent timely notice of accident?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the Award should be modified.

Respondent is a temporary employment agency. In November 2003, respondent assigned claimant to work at a plant where she assembled computer hard drives. When

she commenced working for respondent claimant had no problems with her hands or wrists. But after several months of assembling hard drives, claimant noticed numbness in her fingers. Thinking the numbness might be related to her heart, claimant sought the opinion of her personal physician, Dr. Goodwin. The doctor referred claimant to Dr. Gautham Reddy, who performed a nerve conduction study in August 2004 that indicated claimant had mild to moderate bilateral carpal tunnel syndrome. But, according to claimant, Dr. Reddy did not tell claimant she had carpal tunnel syndrome but merely said she had some nerve damage that did not warrant surgery. Moreover, claimant testified that when she saw Dr. Goodwin she had not experienced pain in her hands.[1]

Claimant did not tell respondent about the numbness in her fingers or about her visits with Dr. Goodwin and Dr. Reddy. Claimant, however, continued performing her regular job, working 12 hours per day, seven days per week.

Next, claimant developed soreness and popping in her right thumb. On October 7, 2004, after claimant reported the problem to her supervisor at the plant, respondent was notified and promptly referred claimant to a physician. Claimant saw Dr. Benjamin Norman on the same date and was referred to orthopaedic surgeon Dr. J. Mark Melhorn.

Claimant prepared an injury report for respondent. That report, which was completed on October 7, 2004, only addresses an injury to claimant's right thumb. Moreover, when claimant first saw Dr. Melhorn on October 22, 2004, claimant told the doctor about right thumb symptoms that had commenced in July 2004 when she noticed her right thumb jerking as well as swelling and numbness in her index and middle fingers. Dr. Melhorn's October 22, 2004, examination included claimant's fingers, thumbs, hands, wrists, elbows and shoulders. And based upon claimant's complaints and the clinical findings, the doctor diagnosed a right thumb trigger.

Dr. Melhorn later added de Quervain's tendinitis to his diagnosis. On November 30, 2004, the doctor operated on claimant's right thumb. In follow-up visits with the doctor on December 7 and 13, 2004, claimant did not mention symptoms other than those associated with her right thumb. But on December 28, 2004, claimant told the doctor that in addition to the numbness she was experiencing in the thumb she also had numbness in her right index and middle fingers, which she noticed while cutting meat at home. When asked, claimant denied she had experienced that numbness at work. At that visit, claimant also disclosed her earlier visit and nerve conduction test with Dr. Reddy. Dr. Melhorn noted in his office records that he would request Dr. Reddy's records. Although Dr. Melhorn later commented on those nerve conduction tests, Dr. Melhorn's notes do not indicate when they were received.

[1] Ries Depo. (Feb. 24, 2006) at 40.

After being off work for a short period following her right thumb surgery, claimant was released to return to work. Claimant returned to the same plant and she was given a different job, which she felt was harder. Claimant testified at her discovery deposition that following thumb surgery her pain worsened and that she began to have shooting pain in her right arm. Nonetheless, she continued working at the plant until her contract expired on December 31, 2004.

On January 4, 2005, which was the last day claimant actually worked for respondent, claimant worked for several hours at a grocery store where she cleaned before being sent home due to an impending ice storm. Claimant allegedly reported to respondent that she was unable to do that job because it hurt her hands. But the notes kept by Lucinda Contreras, claimant's service representative, and Amy Taylor, respondent's branch manager, lack any mention that claimant reported to them any hand complaints at that time. Instead, those notes indicate that claimant contacted respondent on January 10, 2005, and advised that she was ready to accept another assignment. And on January 26, 2005, claimant telephoned respondent that she was going to commence working for another employer, Cessna.

There is nothing in the computer entries for the time period in question that indicates claimant was having problems with her hands other than the right thumb trigger. And both Ms. Contreras and Ms. Taylor testified claimant did not mention that she was having any problems during that time frame with her hands other than the right thumb problem.

Dr. Melhorn's office notes also appear to dispel that claimant was experiencing problems with her hands and wrists in that January 2005 time frame. When claimant saw Dr. Melhorn on January 28, 2005, the doctor's notes indicate that she was upbeat; she was scheduled to start work at Cessna on February 14, 2005; she could perform regular work activities; and the doctor would probably consider rating and releasing claimant if she continued doing well. And when claimant saw Dr. Melhorn on February 4, 2005, the doctor's notes indicate claimant's questions and complaints were limited to the right thumb. At that visit, the doctor examined and tested claimant's right wrist, hand and elbow. The notes from those two appointments do not indicate claimant was displaying carpal tunnel symptoms.

Claimant's good fortune took a turn for the worse, however, when Cessna requested claimant to undergo a pre-employment physical including nerve conduction tests. In March 2005, claimant underwent those tests and was subsequently advised that Cessna would not hire her. At her discovery deposition, claimant indicated that was when she realized her hands were bad and that she needed to have something done.

The Board finds the greater weight of the evidence indicates that claimant then contacted respondent about requesting additional medical treatment. And, according to

respondent's records, that contact occurred on April 18, 2005, when claimant called respondent and reported that Cessna had turned her down as she was disabled. Claimant then began requesting additional medical treatment and to reopen her claim. Thinking claimant was requesting the medical treatment for the right thumb, Ms. Taylor initially consented. Claimant believed these conversations occurred in January 2005, but the greater weight of the evidence indicates they occurred after Cessna had declined to hire claimant.

Claimant returned to Dr. Melhorn, who saw claimant on July 7, 2005. The drawings that claimant provided the doctor at that visit were significantly different from prior drawings as they indicated claimant was having symptoms in fingers in both hands and in the right palm, right wrist, and the dorsal side of the right hand. The doctor recorded the following history:

> Linda Reis *[sic]* is a 58 year old Caucasian right handed female who shares that around March 2004 she began having pain and numbness [in] both hands, right worse than the left. She went to her PCP and had an NCT/EMG done on 8/6/04. She would like to see if anything can be done about the ache and pain when trying to lift and open jars, bags and she has occasional numbness in both hands. Sometime if *[sic]* 2/05 she went to apply for a job with Cessna and the[y] wanted an *[sic]* nerve test done because of prior surgery to the right thumb and wrist. NCT was done on 3/23/05 which showed mild to moderate bilateral CTS. She did not get the employment with Cessna. . . .
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> She presents today complaining of increasing numbness and tingling, thumb, index and middle finger right and left. Apparently she had been working for Manpower doing electrical assembling at LSI. She started on 11/03 and had worked until 12/04. She describes her onset of symptoms being 3/04.[2]

This time, however, Dr. Melhorn concluded claimant's examination was consistent with bilateral carpal tunnel syndrome. Dr. Melhorn also noted claimant had seen Dr. George G. Fluter on June 1, 2005, and that Dr. Fluter had diagnosed carpal tunnel syndrome.

Another indication that claimant's carpal tunnel symptoms did not develop or worsen until after she left respondent's employment came from her own medical expert, Dr. Fluter. Dr. Fluter examined claimant both in June and September 2005. The June 2005 appointment pertained to treatment options. The September 2005 examination was for purposes of rating claimant's impairment. At the second appointment, claimant gave a

[2] Melhorn Depo., Ex. 11.

history that her symptoms had worsened over the last three months or so as her hands were then hurting more with use, she had lost strength, she experienced intermittent cramping in her fingers, and she had experienced tremors in her hands. The increase in claimant's symptoms as noted by Dr. Fluter roughly corresponds to her employment at Vermillion, which she began in July 2005.

1. Did the Judge err by permitting respondent and its insurance carrier to modify their stipulation that claimant's accidental injury arose out of and in the course of her employment with respondent and their stipulation that claimant gave respondent timely notice of accident?

Although a record was not made, at the parties' pre-hearing settlement conference respondent evidently stipulated that claimant's accident arose out of and in the course of her employment with respondent and that claimant provided respondent with timely notice of her accident. When stipulations were being taken at the regular hearing, however, respondent challenged that claimant developed carpal tunnel syndrome due to the work she performed for respondent and further challenged that respondent had been provided timely notice regarding the bilateral carpal tunnel syndrome.

Special Administrative Law Judge Vincent Bogart presided over the regular hearing. But Judge Bogart did not rule on the request to withdraw the stipulations. Moreover, it appears Administrative Law Judge Nelsonna Potts Barnes presided over the pre-hearing settlement conference.

In the Award, Judge Kinch ruled that respondent was not bound to either stipulation. The Board agrees. In this instance, there is no indication what the specific stipulations were at the pre-hearing settlement conference. In addition, respondent established there was good cause to withdraw the stipulations that it had made at the pre-hearing settlement conference regarding the issues in question as facts had been disclosed at claimant's discovery deposition to raise questions about the source of claimant's injuries and the timeliness of notice.

2. Did claimant provide respondent timely notice of the bilateral carpal tunnel syndrome or the hand and wrist problems she experienced from that injury?

When considering the entire record, the Board finds it is more probably true than not that claimant did not notify respondent until sometime after April 18, 2005, of the symptoms in her hands and wrists that were associated with the bilateral carpal tunnel syndrome. Accordingly, claimant failed to provide respondent with timely notice as provided by K.S.A. 44-520.

Notice to respondent of her thumb injury was not notice of an injury to her wrists or the bilateral carpal tunnel syndrome. And in this instance, there appears to be a real distinction between the problems that claimant was experiencing with her right thumb as opposed to the carpal tunnel symptoms that later manifested.

Claimant's last day working for respondent was January 4, 2005. Claimant has failed to prove that she provided notice of her injury or accident to respondent within 10 days of that date or even within 75 days, assuming there was just cause for delaying notice. Consequently, the claim for bilateral carpal tunnel syndrome is barred.

The Board finds claimant did develop bilateral carpal tunnel syndrome before she began working for Vermillion in July 2005. The medical evidence also establishes that the work claimant performed for respondent contributed to her developing that condition. Nevertheless, claimant's symptoms did not significantly develop or manifest themselves before she had left respondent's employment. Consequently, these facts demonstrate the unfairness inherent in the notice statute as it pertains to repetitive trauma injuries in which the symptoms do not always manifest themselves contemporaneous to the trauma. The legislature has selected arbitrary 10-day and 75-day (when there is just cause) deadlines for reporting injuries, including those that are latent and may not become evident until sometime after those deadlines have expired. The result is unfair.

But the remedy lies with the legislature, which may have already addressed the problem. For example, the outcome of this claim may have been different if the recent changes to K.S.A. 44-508(d) had been applicable. That statute was modified by the 2005 legislature to designate the date of accident in repetitive trauma cases. Effective July 1, 2005, the date of accident for a repetitive trauma injury is the date the authorized doctor takes the employee off work due to the condition or restricts the employee from performing the work that caused the condition. And if neither of those contingencies occurs, the date of accident is the earlier of (1) the date the worker gives the employer written notice of the injury or (2) the date the condition is diagnosed as being work-related and the worker is so notified in writing.

Because claimant has failed to prove timely notice of the accidental injury associated with the bilateral carpal tunnel syndrome, claimant's award is limited to her right thumb injury.

3. What is the nature and extent of claimant's right thumb injury?

The record contains two expert medical opinions regarding the functional impairment claimant sustained to her right thumb. Dr. Melhorn, the surgeon who treated claimant's thumb, determined claimant sustained a 5.3 percent impairment under the fourth

edition of the AMA *Guides*[3] to her upper extremity as a result of the thumb injury. On the other hand, Dr. Fluter determined claimant sustained a four percent impairment to the upper extremity due to the thumb.

The Board finds claimant should receive benefits under the schedules of K.S.A. 44-510d for a 5.3 percent permanent disability to the right upper extremity at the level of the forearm.

Based upon the above findings and conclusions, the remaining issues are rendered moot. Noting that Judge Kinch did an excellent job in setting forth his findings and conclusions, the Board adopts those findings that are supported by the record and that are not inconsistent with the above.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[4] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the November 16, 2006, Award entered by Judge Kinch.

Linda M. Ries is granted compensation from Manpower, Inc., of Wichita and its insurance carrier for a January 4, 2005, accident and resulting disability. Based upon an average weekly wage of $512.31, Ms. Ries is entitled to receive 10.60 weeks of permanent partial disability benefits at $341.56 per week, or $3,620.54, for a 5.3 percent permanent partial disability, making a total award of $3,620.54, which is all due and owing less any amounts previously paid.

Claimant's contract of employment with her attorney is approved subject to the provisions of K.S.A. 44-536.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

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[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

[4] K.S.A. 2006 Supp. 44-555c(k).

Dated this ____ day of March, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I would affirm the Special Administrative Law Judge. Notice of injury due to repetitive use micro-traumas to the upper extremity is notice of all resulting injuries. The notice statute, K.S.A. 44-520, requires workers to give their employers notice of the accident, not notice of each and every body part injured as a result of the accident or series of accidents. All of the expert medical opinion testimony on the cause of claimant's bilateral carpal tunnel syndrome relates that condition to claimant's employment with respondent. Likewise, the majority opinion of this Board finds that the trigger finger and de Quervain's conditions in the claimant's right thumb and the bilateral carpal tunnel syndrome condition were caused or contributed to by the series of repetitive use micro-traumas claimant sustained during her employment with respondent. Unfortunately, not all of claimant's symptoms manifested while she was working for respondent. Nevertheless, our appellate Court has held that symptoms do not need to manifest themselves simultaneously, nor do conditions need to be diagnosed at the same time in order for them to be considered as simultaneous aggravations.

> Her injury is compression of nerves in her forearms as a result of repetitive trauma. It is an injury which may not be diagnosed or manifested until the trauma has been discontinued, thus complicating correlation of pain with the cause of the damage. She did not render an opinion, nor, as a layperson, could she as to the cause of damage to a nerve or nerves.
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> . . . .

> All the medical evidence indicates that it was the two-handed activity of use of the computer keyboard, which at times would include use of the mouse, that led to the development of Depew's condition. The sequential manifestation of the injuries does not lead to a different conclusion. In fact, it is entirely consistent with this court's understanding of repetitive trauma injuries to the forearms of workers as expressed, for example, in *Murphy*.[5]

Although the Supreme Court in *Depew* was not specifically addressing notice, its logic is applicable to that issue as well when dealing with injuries that develop over time. Once claimant had given notice to respondent that she was suffering repetitive use injuries to her upper extremity, separate notice specifically for the carpal tunnel syndrome condition was not required. Accordingly, the undersigned Board Member finds that claimant gave timely notice of her series of accidents and, therefore, her carpal tunnel syndrome condition is compensable.

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Terry J. Torline, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
E. L. Lee Kinch, Special Administrative Law Judge

[5] *Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, 25, 26, 947 P.2d 1 (1997).